

Commander and SJA Comments on Removing Disposition Authority from Commanders

I. Objections based on Good Order and Discipline

- A. **Lieutenant General Michael S. Linnington** (U.S. Army, former commander of Military District of Washington): One thing I would say, Your Honor, and I know everybody has kind of said the same thing. But commanders would lose credibility, I believe, with their subordinates when you take these cases away from them. *Transcript of Testimony, RSP Public Meeting at 79 (Sept. 25, 2013)*

II. Objections based on Logistics

- A. **Captain David M. Harrison** (U.S. Navy, Commanding Officer, Navy Region Southwest, Regional Legal Service Office): I think for those cases that go to trial, the logistics probably would not be too terribly complicated that we could not overcome them. But the challenges, as you know, about service wide, 10 percent of the allegations would actually go to trial. So then the question would be for those other 90 percent of those cases, what would we be able to do because I as a prosecutor do not have authority in many areas, both administratively or under the Code, to take action against those individuals. The commander does. *Transcript of Testimony, RSP Public Meeting at 64 (Sept. 25, 2013)*

[A]t this point we make the recommendation. We tried to bring all of the evidence to bear to the commander to give him the learned expertise to advise. That's the criminal investigative agent, the prosecutors, and myself as the senior prosecutor. So we're trying to bring to bear all the resources to make what we believe ultimately will be the right decision in each and every one of these cases.

So if that official were to change, I don't envision that we would discontinue bringing all the resources that we have to try and make the best recommendation, whoever the official – the deciding official would be.

Transcript of Testimony, RSP Public Meeting at 68 (Sept. 25, 2013)

- B. **LTG Linnington**: Logistically, ma'am, what I would say is commanders own all the resources. They own the budget. They own access to the witnesses, the medical health facilities, and all of it. So bifurcating the cases not only creates some complexity for adjudicating them, it also -- the judge advocates don't control the resources that the commanders do. So commanders looking at these things holistically I think are important. *Transcript of Testimony, RSP Public Meeting at 70 (Sept. 25, 2013)*

- C. **Rear Admiral Thomas P. Ostebo** (U.S. Coast Guard, Commander, 17th Coast Guard District Headquarters in Juneau, Alaska): Ma'am, if I could, the suggestion that you would take the convening authority away from the commander is a solution to what problem that we've identified how so far and measured how? In other words, it would imply that somehow the commanders in the field are not pushing 120 cases or egregious cases of any sort to court martial or far enough down the military justice system, which from my experience is not the case. *Transcript of Testimony, RSP Public Meeting at 71 (Sept. 25, 2013)*

And I would submit that logistically that's going to be very difficult to do, especially when you look at the military justice system that's deployable and scalable, that just who's objective is not putting somebody in mail, but it's about discipline and accountability. And it's a deterrence system. None of those other things outside the military are necessarily there.

So I would submit all of that is problematic. And then if you take a case away, how do you -- I do think it's a very real logistic problem of how do you give it back to somebody without undue command influence and with the transparency that our troops and sailors expect in the military justice system when it comes back and someone says, there was no case there, so now you do something with it on your level. Ma'am, that would be extremely problematic.

Transcript of Testimony, RSP Public Meeting at 72-73 (Sept. 25, 2013)

You know, one of my thoughts on this whole thing is, first, let's do no harm to what we currently have as a system. Let's keep it transparent, and let's avoid the 9th order effects of throwing a solution out there to a problem we don't even understand at this point. *Transcript of Testimony, RSP Public Meeting at 74 (Sept. 25, 2013)*

Let's allow a little bit of time here to settle out, measure the changes that were made, put some -- like General Rice was saying, put some measures behind this and understand what we're doing before we start making other wholesale changes.

Transcript of Testimony, RSP Public Meeting at 132 (Sept. 25, 2013)

- D. **Lieutenant Colonel Kevin C. Harris** (U.S. Marines, Judge Advocate General's Corps): As the Panel well understands I'm sure, courts martial are not standing. They're created for limited purposes and limitation durations. And so all of the resources that are required to constitute that, or most of the resources, right now are owned by the commander. Judge advocates lawyers don't own any of those resources, as was mentioned previously.

But what I would highlight to the Panel is what we see in the day-to-day actions of courts martial is the potential for conflicts in terms of prioritization.

Transcript of Testimony, RSP Public Meeting at 80 (Sept. 25, 2013)

- E. **General Edward A. Rice** (U.S. Air Force, Commander, Air Education and Training Command): I would reinforce the idea that many of these cases are complex in terms of the numbers of offenses that are involved, and they paint a holistic picture of what actually happens when they're connected. If you disconnect a piece of that, it's not clear to me how we would do that. *Transcript of Testimony, RSP Public Meeting at 77-78 (Sept. 25, 2013)*

III. Reactions to Proposed Change's Goals of Enhanced Objectivity and Expertise

A. Objectivity and expertise of commanders

1. [COL Cook comment]: One person had said that if a report was made to them, that it was like within a unit you have he said/she said. It's brother and sister who get into a fight, and now you're having dad resolve it, trying to take care of everybody, and then nothing really -- the case either doesn't go forward or a decision is made that doesn't quite achieve justice. *Transcript of Testimony, RSP Public Meeting at 105 (Sept. 25, 2013)*
 - a. [Response from Gen Rice]: But that's not the reality of it. The reality of it is the evidence is the evidence. The investigation is going to be done by the same group of people whether it's OSI or NCIS. *Transcript of Testimony, RSP Public Meeting at 105-106 (Sept. 25, 2013)*
 - b. [Response from LTG Linnington]: I think if commanders are responsible for preventing the incidents from happening in the first place in their unit for all the different things they do to prevent those incidents from occurring, then the commander has to be the one that adjudicates what happens when those events occur.

The brother/sister analogy I appreciate, and I would say that then how -- I mean, keep it from happening in the first place so the parent that's responsible for adjudicating the fight between the kids should be the parent that keeps the kids from fighting in the first place. So in a very simple manner, hold the commanders accountable for these incidents when they occur and charge the commanders to create the climate that prevent them from happening in the first place.

Transcript of Testimony, RSP Public Meeting at 106-107 (Sept. 25, 2013)

2. [Question from Vice Admiral(Ret.) Houck]: I want to twist a little bit and ask the lawyers, do you feel that there is value in the conversations that take place with the commanders?. . . if you get value out of it such that if the commanders were removed from the conversation, do we lose anything? And then I think the follow-on question that somebody will ask to that is, well, you could have that conversation anyway. Even if the prosecutors were independent, they could still always ask for input from commanders. Do you feel that the conversation would have the same quality, that it would take on the same dynamics as it would now? *Transcript of Testimony, RSP Public Meeting at 145 (Sept. 25, 2013)*
 - a. [Response from LtCol Harris]: [F]rom the lawyer's perspective, I don't want that decision, not because I shirked the responsibility or I'm concerned about making that decision. What I'm concerned about as a judge advocate is what I know from my experience of what's going to happen after that decision. Do I want to be part of a court martial process that's viewed as a distraction, as our Canadian brethren referenced it yesterday, something where the commander is not involved in it? . . . the ability of a court martial to effectively adjudicate an allegation fairly for everybody involved is strengthened when that court martial is convened and is a result of the order of a commander versus a lawyer. *Transcript of Testimony, RSP Public Meeting at 147-148 (Sept. 25, 2013)*

- b. [Response from Commander Bill Dwyer (U.S. Coast Guard, Staff Judge Advocate for 17th Coast Guard District Headquarters)]: I would just echo that, and even say in. . . I wouldn't have that same effect on those folks that he does, you know, as a two-star, as they're commander, and then understanding that underlying good order and discipline piece and being able to explain that to folks. . . . The commander has that ability inherent in his authority or her authority, whereas the staff judge advocate, I don't. *Transcript of Testimony, RSP Public Meeting at 149 (Sept. 25, 2013)*
- c. [Response from CAPT Harrison]: They bring a lot of things that we perhaps had not previously considered to the table that we then have to discuss in that environment, and then make a recommendation or just, you know, vet those issues, issues that we had not been exposed to because we're not -- we had not come from the same background as them. *Transcript of Testimony, RSP Public Meeting at 149 (Sept. 25, 2013)*

So the nature of our discussion is not solely focused on this one detail of whether or not to convene, but the whole process of the Uniform Code of Military Justice. And I think that's what a lot of us struggle with here today is that this proposition that we're either going to, one, streamline some constitutionally-protected class of offense or we're simply going to laterally lop off just one small piece; that would be the convening of the courts. *Transcript of Testimony, RSP Public Meeting at 151 (Sept. 25, 2013)*

B. Structural checks on commander bias currently in place

1. [Question from Mr. Bryant]: [I]n terms of the fitness reports, OERs, and the emphasis that you put on is there sexual harassment... Wouldn't and don't those criteria exist regardless of the commander's authority to initiate a courts martial? Wouldn't you still be requiring and holding accountable your subordinate commanders for their addressing those issues, even if you didn't have convening authority?
 - a. [Response] (A chorus of yeses.)
2. All right. And then secondly, and it's sort of a follow up to that. You all have engaged in your efforts in training, the emphasis of the command attention, prevention, and intervention, as you have addressed, in your units. And wouldn't you have exercised and initiated those efforts, even if you didn't have court martial convening authority? I assume the answer is yes.

Transcript of Testimony, RSP Public Meeting at 96-97 (Sept. 25, 2013)

 - a. [Response from LTG Linnington]: Yes. But the question is how effective would you be? *Transcript of Testimony, RSP Public Meeting at 96-97 (Sept. 25, 2013)*

C. Fears of retaliation as a reason for underreporting

1. [Question from Vice Admiral(Ret.) Houck]: There are multiple ways in which people can report sexual offenses today. If we take commanders out of the decision making process for referring courts, will it lessen the instances of retaliation, to put it directly?

If we take commanders out, will retaliation go down? *Transcript of Testimony, RSP Public Meeting at 151 (Sept. 25, 2013)*

- a. [Response from CDR Dwyer]: I don't see -- Sir, I don't see how it can. ... So I think the retaliation piece is not shielded in any way by taking it over to, you know, some other person that actually convenes the court martial because you'll be retaliating against the allegations, not against the adjudication, quite frankly. And what I've seen is the tension begins the second an allegation is made at a command. So on that side of it, I don't think -- I can't see logically why that would go away, sir. *Transcript of Testimony, RSP Public Meeting at 155 (Sept. 25, 2013)*
- b. [Response from Gen Rice]: My quick comment on that would be in my experience, the reason one of the top reasons people don't report is because they perceive that the environment into which they are going to report is either, at worst, hostile or, at best, not welcoming. And my experience is in many cases that's true, but it's not at the level of the commander, it's the level below the commander and the individual offices and the unit. *Transcript of Testimony, RSP Public Meeting at 156 (Sept. 25, 2013)*
- c. [Response from LTG Linnington]: Sir, I would say commanders are in the best position to care for the victims who report these crimes, and, therefore, their investment in the decision making process would be what defeats the retaliation or prevents retaliation. I think if you take the commander out of the picture, I think the retaliatory nature of these reports has to go up, my opinion. *Transcript of Testimony, RSP Public Meeting at 157 (Sept. 25, 2013)*
- d. [Response from LtCol Harris]: Sir, I would just simply add that there were -- I think retaliation, the most common form of retaliation that is referenced by victims that we interact with is, as we stated before, at, quite frankly, a very low level. It's not at the level of the commander. If we had retaliation at the level of a commander, there'd be multiple ways to handle that. But when we're talking about the retaliation at a lower level, the one who's in the best position with the most tools available to them to resolve that issue is the commander. If we turn that over to a lawyer, the lawyer has got one tool available to him, and that's to prosecute. We're not going to prosecute our way out of that problem set. The commander has so many other tools available to impact and to reduce the possibility of retaliation however we define that term. *Transcript of Testimony, RSP Public Meeting at 157-158 (Sept. 25, 2013)*

IV. Evidence Relevant to Proposed Change

A. Recent progress under status quo

1. **Gen Rice:** For example, in my command where every airman comes into the Air Force because we do basic military training both for officers and enlisted, so we touch literally every airman, in my command, the numbers of reports of sexual assault that occurred prior to their entrance into military service has increased from 18 percent in 2009, to 28 percent in 2010, to 30 percent in 2011, a slight dip to 27 percent in 2012, and then a significant increase, a surge, if you will, to 38 percent this year in 2013. Thirty-eight percent of the people who come in and report a sexual

assault to us are reporting activity that happened prior to their entrance into military service. I draw two conclusions from these statistics: first, that a large and increasing number of airmen entering the Air Force find an environment that is more conducive to reporting sexual assault crimes than the environment that they left in the civilian world, and, second, that our efforts to create this very environment, largely based on the work of our commanders, is working. *Transcript of Testimony, RSP Public Meeting at 30-32 (Sept. 25, 2013)*

2. **Major General Steven W. Busby** (U.S. Marines, Commanding General of Third Marine Corps Aircraft Wing and Headquarters in Marine Corps Air Station, Miramar): Reports of sexual assault have increased by over 75 percent – 70 percent, excuse me -- in Fiscal Year '13. This tells me that our marines have confidence – have confidence that we're there for them. So the reports have increased significantly. Prosecutions have doubled. Convictions have increased by over 100 percent. Punitive discharges have increased by over 100 percent. Confinements over five years have almost tripled. And since 2010, we've prosecuted 28 sexual assault, sexual misconduct cases declined by civilian jurisdictions with a 50 percent conviction rate.

We're seeing a four to five times increase in restrictive reports being turned into unrestricted reports telling me as a commander that my marines have confidence that we're there for them once they get inside the victim care system and know we're there for them.

Transcript of Testimony, RSP Public Meeting at 51-52 (Sept. 25, 2013)

B. Comparisons to civilian and Allied military systems

1. **Gen Rice:** My view is we have an opportunity now to actually do something positive... So the fact that other militaries may have instituted this -- a similar legal provision that is being proposed that takes commanders out of the loop and they don't have any evidence that their militaries are falling apart to me is not the right question. The question is, do they have any evidence that this has actually been effective in solving the problem? If not, then to me it's not the best place for us to expend our energy. *Transcript of Testimony, RSP Public Meeting at 101-102 (Sept. 25, 2013)*

I just don't see that there's any evidence, and if anybody has some I'd be happy to see it, that by having somebody else that victims can believe will make the decision about whether to prosecute this or not will substantially increase the number of people who actually come forward to report. I don't think that's the case. When you ask victims why they don't report, it isn't that. *Transcript of Testimony, RSP Public Meeting at 104 (Sept. 25, 2013)*

V. Objections Based on Commander Accountability and Responsibility

A. 'Commanders must remain accountable'

1. **LTG Linnington:** All of our leaders at every level in our profession must be held accountable for preventing and responding to sexual assault in their ranks and under their commands. *Transcript of Testimony, RSP Public Meeting at 16 (Sept. 25, 2013)*

Strengthening the commander's role and holding our commanders accountable is the best way to solve sexual harassment and assault in our ranks. If commanders were no longer accountable, then they are less effective, I believe, in making the cultural change that will sustain a fix to this problem. *Transcript of Testimony, RSP Public Meeting at 16 (Sept. 25, 2013)*

If it's not your responsibility, then you just kind of say, you know, it's not my problem. *Transcript of Testimony, RSP Public Meeting at 144 (Sept. 25, 2013)*

2. **Rear Admiral Dixon R. Smith** (U.S. Navy, Commander of Navy Region Mid-Atlantic): Commanders' ability to hold offenders accountable for their behavior and their crimes is key to maintaining good order and discipline and also the interests of justice.

To remove a commander from that role with respect to sexual assault or any other criminal offenses would have a detrimental impact on the role of the commander to fulfill the mission. I am responsible and accountable for my people, and I need to have the tools to execute that - - be accountable and execute that responsibility.

Transcript of Testimony, RSP Public Meeting at 22-23 (Sept. 25, 2013)

[Question from Vice Admiral(Ret.) Houck]: Why are you a better person to be the decision maker in terms of whether or not an accusation would go to trial, for example, than Captain Harrison, for example, who would be probably would no doubt fall under the category of an experienced military prosecutor? Can you reflect on that a little bit? *Transcript of Testimony, RSP Public Meeting at 143 (Sept. 25, 2013)*

[Response from Rear Admiral Smith]: The first thing I would give you is I'm accountable for my command, and I have the responsibility to you, all of you, all of us as taxpayers and citizens of this country to deliver a unit that can perform. And I've got an individual that is not doing their job, I have a responsibility to hold them accountable, not him. *Transcript of Testimony, RSP Public Meeting at 143 (Sept. 25, 2013)*

3. **Gen Rice**: [T]here would be many times during my career that people would try to give me responsibility without the associated authority required to fulfill that responsibility, and that I should resist this disconnect whenever it happened because responsibility without authority is a recipe for failure. *Transcript of Testimony, RSP Public Meeting at 28 (Sept. 25, 2013)*
4. **MajGen Busby**: And just as important it is to ensure that they have all the tools to train and care for the victims is they have the tools to hold those accountable who commit this crime. And they have the tools to ensure that our standards are maintained, that they're able to maintain good order and discipline in their commands.

They must have the ability to visibly lead this effort in both prevention and in adjudication. Responsibility must be accompanied by authority to hold violators accountable. Without the ability to hold accountable, we're tying the hands of those we know can make a difference, those we've already seen can make a difference, will limit their ability to engage and make a behavior change in order to instill values

we know that are missing in some of our marines to prevent this time far, far more difficult. Our commanders are the center of gravity in this effort, and we must ensure that we provide them all the tools needed in prevention and adjudication. *Transcript of Testimony, RSP Public Meeting at 50-51 (Sept. 25, 2013)*

That we would remove the ability of the individual that we hold responsible to make the difference that we're after, and that is preventing the sexual assault in the first place. So when we remove him from that ability to hold people accountable by putting the -- that authority in some nameless or faceless -- nothing against lawyers - - nameless or face lawyer someplace, and I'll talk as a marine, that the marines won't see or know or understand. We removed from the ability of the individual who we are tasking to make a difference, the ability to do just that, by removing that critical tool to hold people to the standard. *Transcript of Testimony, RSP Public Meeting at 75 (Sept. 25, 2013)*

5. **Rear Admiral Ostebo:** As the leader, the commander is ultimately responsible for the health and safety of each person within his or her charge and, thus, must set the tone for the unit and be able to speak frankly and openly on all aspects of conduct. I also understand that the commander must remain neutral and detached from individual cases so that when called upon, he or she is able to act in a way that supports a fair, impartial military justice system while at the same ensuring good order and discipline. *Transcript of Testimony, RSP Public Meeting at 58 (Sept. 25, 2013)*

Finally, taking general court martial or convening authority away from me in any way would, in fact, be prejudicial to my ability to do my full spectrum of job, to get back to the question that you asked, sir. For me to stand up in front of my folks on this issue or any other issue and tell them they are going to be held accountable by me for their conduct on and off duty, and, oh, by the way, you may be held accountable by somebody else if they decide to take it up on these issues outside of this chain of command, would be crazy. I believe that I want to have the full spectrum from administrative all the way up to court martial and imprisonment if necessary for the actions of the people below me. *Transcript of Testimony, RSP Public Meeting at 132-133 (Sept. 25, 2013)*

B. 'Only commanders can effect the cultural change that is required'

1. **LTG Linnington:** I fully supported the chief of staff of the Army's number one priority and our Army's five-pronged approach to eliminating sexual assault from our Army . . . it's critical, I believe, that we do keep commanders involved and at the center of solutions to combatting sexual assault and harassment. Increasing commander involvement and accountability is key to solving this problem. *Transcript of Testimony, RSP Public Meeting at 12-13 (Sept. 25, 2013)*
2. **Gen Rice:** Because of this pact with our airmen is based on trust, it is very difficult for me to endorse a course of action that would weaken this essential element. In fact, instinct would be the opposite, to look for ways to strengthen the trust that must exist in any military unit in order for it to be fully effective. *Transcript of Testimony, RSP Public Meeting at 30 (Sept. 25, 2013)*

In my view, it is time to double down, if you will, on the role of the commander in effectively addressing the issue of sexual assault as opposed to decreasing their authorities and responsibilities in this area. As I said earlier, authority and responsibility go hand-in-hand, and we should not somehow think that we can reduce one without reducing the other.

Transcript of Testimony, RSP Public Meeting at 30-32 (Sept. 25, 2013)

3. **Colonel Polly S. Kenny** (U.S. Air Force, Staff Judge Advocate for Air Education and Training Command): (discussing the Lackland MTI sexual assault cases) In order to be able to affect that change and to be able to provide a safe, secure training environment, the commanders had to be lockstep with the prosecution process. *Transcript of Testimony, RSP Public Meeting at 77 (Sept. 25, 2013)*

4. **Rear Admiral Ostebo**: This idea that junior officers would like to get rid of some other administrative or other -- my JOs would love to have nothing to do other than operations and everything else somebody else can deal with. I think that's just a natural -- and the more junior you get, the more you see that because they may not have the bench strength of a JAG working for them. But on the 120 cases, they roll up to us anyway, so if they're giving away something they don't currently have, at least not within my chain of command. So I don't -- I'd be careful again about asking a junior person necessarily who may not have the experience or fully understand the value of 200 years or so of experience that you have sitting at this table and why something they have and may not use may be of value to them. *Transcript of Testimony, RSP Public Meeting at 129-130 (Sept. 25, 2013)*

5. **Colonel Corey L. Bradley** (U.S. Army, former SJA for Military District of Washington):

[Question from Professor Hillman]: [I]s the problem different in the armed forces than it is in civil society? . . . If it's not distinctive from -- if it's not a distinctive problem in the military, it's tougher to decide that command authority and responsibility is the right way to resolve this. If the problem really runs to subjective factors related to the confidence of individuals, the fortitude they need to have in order to report those assaults. So if it's not actually a different problem, why is the answer inside command and not in some comparable civilian process? *Transcript of Testimony, RSP Public Meeting at 166 (Sept. 25, 2013)*

[Response from COL Bradley]: [I]t's not so much that the problem is different in society or in the military. . . . But what I think we would say or I think the command would say is that it's the effectiveness of the unit that is at risk, that if you change the dynamics of it, how it is currently -- even though we're approaching it with a lot of energy and true, you know, focus, when you remove the commander from the process, you're going to -- you may get change, but you don't know. But it's very clear that you will undermine the commander's authority, and, thus, put the unit, the mission at risk, I think. *Transcript of Testimony, RSP Public Meeting at 166-167 (Sept. 25, 2013)*